*THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

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+WRIT PETITION No.21010 of 2007

% Dated 14-12-2007

Sri Balaji Constructions

Petitioners

VERSUS

$ Govt., of Andhra Pradesh, rep., by its Secretary (R&B), Secretariat, Hyderabad & three others.

Respondents

! Counsel for the Petitioner: Smt. C. Vani Reddy

^Counsel for Respondents 1 to 3: G.P. for R & B

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> HEAD NOTE:

? Cases referred

1. (1979) 3 SCC 489
2. (1994) 6 SCC 651
3. (2004) 3 SCC 553
4. (2007) 8 SCC 1
5. 2003 (50) ALD 87 (DB)

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THE HON'BLE MR. JUSTICE C.V.NAGARJUNA REDDY

WRIT PETITION No.21010 of 2007

Date: .12.2007

Between:
Sri Balaji Constructions

… Petitioner

AND

Govt. of Andhra Pradesh,
Rep by Secretary (R&B),
Secretariat, Hyderabad.
and three others.

… Respondents

Counsel for the petitioner: Smt C.Vani Reddy
Counsel for respondents 1 to 3 : G.P. for R & B

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HON'BLE MR. JUSTICE C.V.NAGARJUNA REDDY

WRIT PETITION NO.21010 of 2007

ORDER:-

The petitioner, whose pre-qualification bid in respect of contrac namely, "improvements to Rajupalem-Iskapalli road from KM 12/4 t covered by tender notification dated 14.9.2007" is rejected, filed the p writ petition. Initially the petitioner questioned the said rejection and l way of an amendment it assailed awarding of contract in favour of resp No.4 and sought for consequential direction to respondents 1 to 3 to op price bid of the petitioner.

Respondent No.3 issued tender notice bearing NIT No.42678(1), (R&B) A & R/EE(R)/TA.3/AEE.2/2007-08, dated 14.9.2007 throu procurement for execution of contract work which was described abo pursuance of the above mentioned tender notice, the petitioner down- the bid documents and submitted its tender through e-procure Respondent No.4 (impleaded vide order dated 12.11.20(W.P.M.P.No.30595 of 2007) is the only other tenderer who submit tender. The last date and time stipulated for receipt of bids was 5.10.2 3.30 P.M. and the pre-qualification/technical bid was scheduled to be on 5.10.2007 at 4.00 P.M. Opening of price bid was scheduled for 8.1 at 4.00 P.M. The present writ petition is filed on 3.10.2007 by the petitic the apprehension that in view of the patent discrepancy between the notice and the bid documents on the requirement of possession of equi respondents 2 and 3 may reject its pre-qualification/ technical bid.

In the affidavit filed in support of the writ petition, the petitioner p that in clause 3.3B of the tender notice, respondent No.3 deliberately om mention the words "to be procured" in respect of key and critical equi while the tender document contains the said column besides the oth columns, namely 'owned' and 'leased'. It is specifically alleged in the a

that respondents 2 and 3 are responsible for this omission in order to eli competitive bids with a view to favour a few contractors. The petitioner averred that as the bid document does not make owning or leasing of t and critical equipment a pre-condition and it facilitates the tenderer to p the said equipment after the award of the contract and entering ir agreement, the petitioner filed its tender and that its pre-qualification/te bid therefore, cannot be rejected on the ground of its not owning or leas said equipment.

Sri P.Sridhar, Superintending Engineer, Roads and Buildings, Circle – respondent No.3 filed counter affidavit. It is mentioned therein t technical bids of the petitioner and another contractor (respondent No.4 opened on 5.10.2007 and on scrutiny it was found that the petitioner fa submit analysis for procuring the machinery and details in regard purchase of the machinery as required under the form and that therefc petitioner's technical bid was rejected by him. Respondent No.3 averred that after rejecting the petitioner's technical bid he submitted his to respondent No.2 who is the approving authority and that the same is p consideration. While denying the allegation of the petitioner that the wc be procured" were deliberately omitted, respondent No.3 referred to cla (Annexure-III) of the bid document which provides for payment of mobi advance for procurement of the machinery and averred that in the face said clause, the petitioner's allegation is unsustainable. He further p that even if the tender notification does not contain the said words procured", the same is required to be read with the bid document under the tenderer shall make a mention of the procurement of the machin claiming mobilization advance, more so as the petitioner executed other of the value of above Rs.1.00 crore at Kurnool which fact pre-suppos the petitioner had knowledge about the necessity of procurem machinery. Respondent No.3 also disputed the claim of the petitioner submitted its tender on 30.9.2007 and stated that the petitioner uploac

tender documents only on 5.10.2007 at 12.27 P.M. Respondent No.3 averred that as evident from Annexure-III of the documents filed b alongwith counter affidavit, a tenderer has to indicate the availability machinery, either owned or to be procured through advance mobilizati since the petitioner failed to notify the details in the 'remarks' colun petitioner's bid is treated as incomplete and hence rejected in accordan the guidelines issued by COT (Commissioner of Tenders). It is also a by respondent No.3 that the petitioner filed a fabricated document whi not in complete form and not forwarded to their office. Responden reiterated his stand that the petitioner's technical bid was disqualifi therefore, the question of considering the same does not arise.

The application filed by respondent No.4 for its impleadment was a on 12.11.2007. In the affidavit filed by the Managing Partner of resp No.4 in the implead application, it is pleaded that as per the tender no days time was given from 20.9.2007 to 5.10.2007 for submitting bids and any contractor has any doubt it was always open for him to approa Superintending Engineer concerned for clarification within the said peri further stated that he came to know that his tender was accepted department and he received letter dated 2.11.2007 to that effect. He copy of the said letter addressed by respondent No.3 wherein responde was informed that its tender filed at 4.06% excess over the estimated c value of Rs.1,35,17,032/- was accepted for the sum of Rs.1,40,65,82 respondent No.4 was asked to enter into agreement on or before 16.11 Respondent No.4 therefore pleaded that as it was informed by the depa that since the writ petition filed by the petitioner is pending, they are un enter into agreement with it. Respondent No.4 therefore, sought for dis of the writ petition. In a separate counter affidavit filed on behalf of resp No.4 on the same date, similar averments have been reiterated.

In view of the fact that contract was awarded in favour of resp No.4 after filing of the writ petition, at the hearing on 20.11.2007, l

counsel for the petitioner requested for adjournment of the case to ena petitioner to seek appropriate amendment of the writ petition and accc hearing of the case was adjourned and the petitioner filed W.P.M.P.Nc of 2007 seeking amendment of the prayer in the writ petition to challer award of contract in favour of respondent No.4. Respondents 1 to 3 ha filed any counter affidavit opposing the said application. Responder however filed a counter affidavit in which it is mentioned that sin petitioner has not submitted any particulars as to how it is going to proc machinery and failed to avail the 15 days time provided for s clarifications, the writ petition is liable to be dismissed.

Today, by a separate order, W.P.M.P.No.32858 of 2007 filed petitioner for amending the prayer of the writ petition is allowec considering the averments contained in the application and the counter a filed by respondent No.4.

In the reply affidavit, the Managing Partner of the petitioner firm denied the allegation that the petitioner filed fabricated documents. It is explained therein that on 30.9.2007, the tender document was submitted (uploaded) and the same was saved. Before finally submitting the documents on 5.10.2007 the same was modified twice. It is stated that the bid documents uploaded on 30.9.2007 were downloaded and filed before this Court alongwith the writ petition. The petitioner further maintained that the question of purchasing of equipment for claiming the mobilization advance would arise after contract is awarded and agreement entered into and therefore, there was no need to furnish any details for procuring the equipment at the time of filing tender.

Heard Smt.C.Vani Reddy, learned counsel for the petitioner, learned Government Pleader for respondents 1 to 3 and Sri K.Satyanarayana Murthy, learned counsel for respondent No.4.

In the light of the facts referred to above, the issue that arises for consideration is whether the action of respondents 2 and 3 in rejecting the pre-qualification/technical bid of the petitioner is in

conformity with the tender conditions and valid?

Clause 3.3 of the tender notice contains qualification criteria for opening the price bid. This clause comprises sub-clauses A and B. Since there is no controversy regarding fulfillment of qualifications mentioned in sub-clause-A by the petitioner, the same need not be discussed herein. Sub-clause B (a) (i to vi), which are relevant for the present purpose read as under:

> " B) Each bidder should further demonstrate:
>
> a) Availability (either owned or leased of the following key and critical equipment for this work).
>
> Sl.No.Equipment type and characteristics Minimum Nos required
>
> i) Smooth Wheeled Tandem Roller 6 to 8 T 1 No.
>
> ii) Static Weight Roller 80-100 KN 1 No.
>
> iii) Vibratory Roller 8T 1 No.
>
> iv) Paver Finisher (Mechanical) 100 TPH 1 No.
>
> v) Front End Loader – 1 cum 1 No.
>
> vi) Weigh Batch Mixers 1 No.

The bid document available on the file produced by the learned Government Pleader contains different statements to be filled in and submitted by the tenderer. Statement-V is one such statement which reads as under:

STATEMENT – V

Availability Of Critical Equipment

The tenderer should furnish the information required below, regarding the availability of the equipment, required for construction/quality control.

Sl. No.	Details of Equipment	Number Required	Number Owned	Number Leased

1	2	3	4	5

Note: For all works costing more than Rs.2.00 crores, the Contractor shall submit quality plan and also show proof of owning quality lab or tie-up with an established quality lab.

Signature of the Tenderer

A declaration regarding the equipment owned shall be produced by the Tenderer on a non-judicial stamp paper of Rs.100/- as below:

DECLARATION

"I ……..do hereby solemnly affirm and declare that I/We own the following equipment for using on the subject work and also declare that I/We will abide by any action such as disqualification or determination of contract or blacklisting or any action deemed fit, if the department detects at any stage that I/We do not possess the equipment listed below.

Sl. No.	Details of each Equipment	Year of Purchase	Regn. Number	Capacity	Any Other Data	Is it in working condition
1	2	3	4	5	6	7

Thus a reading of the notice inviting tenders and the bid documents shows that there is no column "to be procured". However down loaded copy made available by respondent No.3 under e-procurement which is filed by the petitioner as well as respondent No.3 contains a separate column "to be procured". In the pleadings of the respondents the fact that there is a provision for the equipment to be procured is not denied. At the hearing the learned Government Pleader candidly admitted that the petitioner's technical bid is not rejected on the ground that it was not readily having the machinery as owned or leased. But he submitted that the only ground on which petitioner's technical bid was rejected was that it failed to give details under the column "remarks (from whom to be purchased)".

It is appropriate in this context to extract the relevant portion of the counter affidavit of respondent No.3 in which the reason for

rejection is mentioned, herein below:

> "On scrutiny it has been found out that the writ petitioner has failed to submit analysis for procuring the machinery as required under the form and there are no details in regard to the purchase of the machinery as required under the form, were not furnished and the technical bid of the writ petitioner has been rejected by this respondent and accordingly this respondent has submitted the report to the approving authority i.e., 2nd respondent herein."

From a careful consideration of the tender conditions and perusal of the documents I find that the reason given in the counter affidavit of Respondent No.3 and reiterated by the learned Government Pleader for Transport during the hearing is at variance with the reason for rejection contained in the record. In the note-file containing 16 pages in which technical bids of the petitioner and respondent No.4 were evaluated at page-3 it is mentioned "not filled the column "From whom to be procured" and also not uploaded supporting documents". These remarks were made with reference to column No.6 of S.No.6 relating to availability of key and critical equipment. An endorsement was made near that column to the following effect:

> "please mention the cost of equipment to be procured and amount of mobilization advance to be given.
>
> Sd/
> 16.10.2007."

At page-5 it is mentioned as under:

> " Sir,
>
> Cost of machinery to be procured as per the invoices obtained from different firms as follows:
>
> | Sl. No. | Name of Machinery | Amount | Invoice date |
> |---|---|---|---|
> | 1. | Smooth Wheeled Tandem Roller | 24.98 laks | 19.8.06 |
> | 2. | Static Weight Roller | 3.25 laks | 21.9.07 |
> | 3. | Vibratory Roller | 21.99 laks | 31.1.07 |
> | 4. | Paver Finisher | 14.51 laks | |
> | 5. | Front End Loader | 19.87 laks | 30.6.07 |
> | 6. | Weigh Batch Mixers | 4.25laks | 17.1.07 |

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For new machinery 88.85 laks
For old machinery 44.42 laks
@ 50%

The amount of mobilization advance works out @ 5% of ECV. Is Rs.6.76 laks."

At the bottom of that page, the following endorsement is found:

" Hence disqualified since the cost of equipment to be purchased does not match with the mobilization advance.
Sd/
20.10.07."

In the tender evaluation report of respondent No.3 sent to respondent No.2 alongwith his covering letter dated 22.10.2007 (from pages 65 to 97 of correspondence file), it is mentioned in para-6 as under:

" 6) **Evaluation of Technical Bid:**

6.1) The tenderer M/s.Balaji Constructions, Nellore which is disqualified since the cost of equipment to be procured does not match with the mobilization advance and the another tenderer M/s.Bhavani Constructions, Nellore satisfied the NIT conditions and eligibility criteria.

6.2) The technical bid evaluation is made as per format which are enclosed. As per technical bid evaluation the qualified tenderer was found eligible for opening of price bid and hence selected for next stage."

As stated earlier though it was pointed out during the evaluation of technical bid that analysis of key and critical equipment to be procured was kept blank under column 6, respondent No.3 directed his subordinates to mention the cost of equipment to be procured and amount of mobilization advance to be given. Accordingly, after obtaining invoices from different firms, the office of respondent No.3 put up a note on the alleged cost of the equipment which was arrived at Rs.88.85 lakhs for new machinery and Rs.44.42 lakhs for old machinery. The office note further pointed out that the advance

mobilization works out to Rs.6.76 lakhs. It is on this note that respondent No.3 endorsed that the petitioner's tender is disqualified on the purported ground that the mobilization advance does not match with the cost of the equipment.

It is thus abundantly clear that the ground of rejection put forth in the counter affidavit and sought to be re-inforced by the learned Government Pleader at the hearing is totally false.

While the above mentioned reason contained in the file is not disclosed in the counter affidavit of respondent No.3 nor made basis for the argument of the learned Government Pleader, respondents 2 and 3 failed to either plead or substantiate as to how the said reason viz., that the cost of equipment to be procured does not match the mobilization advance, can be sustained qua the tender conditions. Therefore, there is no need for this court to delve into the sustainability or otherwise of the said ground. But as a matter of academic interest I have carefully examined condition No.49 which pertains to payment of mobilization advance. Under the said clause in respect of the works whose value exceeds Rs.2.00 crores of estimated contract value, the contractors are permitted to avail the facilities of mobilization advance in two installments equivalent to 10% of the contract amount named in the letter of acceptance, against bank guarantee. Under clause 49.7.1 payment of mobilization advance @ 5% each of the contract value towards purchase and labour mobilization is provided for. Machinery advance is payable on production of invoices in proof of purchase of the machinery and such invoices should be on the name of the contractor/firm/joint venture only and the machinery should have been purchased only after the date of conclusion of the agreement for the work on which the payment of mobilization advance is proposed. From these clauses it is clear that the issue of payment of mobilization advance would arise in respect of the machinery purchased after the date of conclusion of the agreement.

A careful examination of Clause 49 shows that a facility is made

available to the contractor to whom the work is awarded to draw some advance money against Bank Guarantee to facilitate purchase of machinery. This clause from its very nature is purely optional and cannot be enforced on the unwilling contractors. Clause 3 which prescribed pre-qualification criteria neither made a reference to Clause 49 nor stipulated that in the case of machinery to be procured by the contractor he should satisfy that the cost of equipment to be procured shall not exceed the amount of mobilization advance which he is entitled to draw and that his technical bid will be liable for rejection in such an event. In the absence of such a stipulation this court is unable to visualize the rationale behind the whole exercise undertaken by respondent No.3 to first prove that the cost of equipment exceeds the limits of machinery advance and then reject the technical bid of the petitioner on that ground. It is significant to note that neither in the record of respondent No.3 nor in his counter a whisper is made about the lack of capacity of the petitioner to purchase key and critical equipment on his own, without the aid of the mobilization advance. It is therefore, beyond one's comprehension as to how the so called mismatching of cost of equipment with mobilization advance could be made a ground at all.

From the discussion undertaken above, I have no doubt in my mind that respondent No.3 has mislead this Court by not disclosing the true reason for the rejection of the technical bid of the petitioner. Respondent No.3 obviously in order to eliminate the petitioner from consideration rejected the technical bid of the petitioner on a jejune ground. Evidently having realized that such a reason cannot be sustained before this court, he had suppressed the said reason and pleaded a reason which, on a careful scrutiny of record is found to be false.

Law on the award of contracts is well crystalised. Award of contracts is recognized as distribution of largess by the State and the preponderance of judicial opinion is that while awarding contracts the State shall maintain absolute fairness and transparency.

In **Ramana Dayaram Shetty vs International Airport Authority of India**[1] it is held as under:

" We agree with the observations of Mathew.J, in V.Punnan Thomas v. State of Kerala AIR 1969 Ker 81 (FB) that:

> "the Government, is not and should not be as free as an individual in selecting the receipts for its largess. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal".

"It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

In **Tata Cellular Vs. Union of India**[2], it is held that it is open to the Court to review the decision makers' evaluation of the facts; that the Court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision maker and if the weight of facts point to one course of action, a decision the other way cannot be upheld. It is further held that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. The Supreme Court however confined such interference of the constitutional courts to three grounds, namely, illegality, irrationality and procedural impropriety.

In **ABL International Ltd., and Another Vs. Export Credit Guarantee Corporation of India Ltd., and Others**[3] the Supreme Court went a step further and held that in a concluded contract the High Court can intervene under Article 226 of the Constitution if the State or its instrumentalities act in an arbitrary manner.

In **Reliance Energy Ltd., and Another Vs. Maharashtra State Road Development Corpn., Ltd., and Others**[4] while re-stating the

principles of judicial review in the matter of award of contracts the Supreme Court held that if the State policy or its acts even in contractual matters fails to satisfy the test of reasonableness, such a policy or act would be unconstitutional.

By applying the settled legal principles to the facts of the case, I am of the considered opinion that the technical bid of the petitioner is rejected in a highly arbitrary manner. The reason contained in the record for such rejection posits no criterion as could be traced to any of the tender conditions and is therefore, totally irrational. On the admitted facts of this case it is clear that only two contractors filed their bids and on the elimination of the petitioner there remained only one bid in the field, leaving no option to respondents 1 to 3 except to accept the same at 4.06% excess over the estimated contract value. Exclusion of the petitioner's price bid from consideration would thus undoubtedly affect public interest in the event it is found that the petitioner has quoted lower price.

At the hearing, the learned counsel for petitioner repeatedly asserted that the petitioner quoted the rates which are below the estimated contract value. Though mere difference in the price offered by the contractors is not the sole criterion in finalizing the contracts as held by the Division Bench of this Court in **Union of India and Others Vs. Laxmi Builders, Secunderabad and Others**[5] on which reliance is placed by the learned Government Pleader, it undoubtedly is one of the criteria to be kept in mind in finalizing the contracts. This is not a case where the petitioner is found wanting in satisfying the pre-qualification conditions as in the case decided by this Court in **Laxmi Builders (5 supra)**. Therefore, in a case of this nature where the technical bid of the petitioner is sought to be rejected on a flimsy and non-existing ground, the fact that with the elimination of the petitioner respondent No.4 alone remained in the field and the further fact that in the event the petitioner's price bid is found to be the lowest rejection of petitioner's technical bid would affect public interest, are certainly relevant considerations to be kept in view by this Court because it is eventually the public interest which is of paramount importance.

On a consideration of the entire case, I am convinced that the action of respondents 2 and 3 in rejecting the technical bid of the petitioner is arbitrary, irrational and against public interest.

In the premises as aforesaid, the writ petition is allowed. Proceedings dated 26.10.2007 whereby contract was awarded to

respondent No.4 is set aside and respondents 3 and 4 are directed to open the price bid of the petitioner and finalise the contract after evaluation of the price bids of the petitioner and respondent No.4.

Though I am convinced that respondent No.3 attempted to mislead this Court, I refrain from initiating action against him by taking a lenient view and let him off with the warning not to repeat such acts of misdemeanor in future.

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C.V.NAGARJUNA REDDY,J

Date: 14.12.2007

Mdaa

LR copies to be marked.

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[1] (1979) 3 SCC 489

[2] (1994) 6 SCC 651

[3] (2004) 3 SCC 553

[4] (2007) 8 SCC 1

[5] 2003 (50 ALD 87 (DB)